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Court for the State of Missouri, in *The United States vs. The Steamboat James Monroe*, and *The United States vs. The Steam Ferryboat Pope*, 1 Newbury's Reports, 241 and 256, holds the same opinion.

The information will be dismissed for want of jurisdiction.

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*In the Supreme Court of Pennsylvania, 1862.*

ALEXANDER DEAN AND WIFE vs. DANIEL NEGLEY AND STERLEY  
CUTHBERT.

1. In an issue to try the validity of a will, which was contested on the ground of undue influence, want of mental capacity, coercion, and on other grounds, it appeared that, by the alleged will, the testator gave a trifling sum to his only legitimate child, and then bequeathed the residue of his property to the children of a woman with whom he was alleged to have been living in adulterous intercourse. There was no direct evidence given or offered of want of mental capacity at the time, or of any actual coercion or influence exerted in the testator as respects the testamentary act; but it was proposed to prove the fact of this adulterous intercourse, which was of long continuance, and which had obliged his wife and daughter to abandon his house, and that the alleged adulteress was a woman of vigorous character, and exerted a despotic influence over his actions generally, in connection with the fact that he was suffering from a painful disease, to relieve which he took opiates, as tending to show undue influence generally. *Held*, that the evidence was admissible for this purpose, on the ground that the relation being an unlawful one, the influence which sprang from it must also be unlawful.
2. *Seemle*, by LOWRIE, C. J., that this would be a presumption of law.

Error to the Court of Common Pleas of Allegheny county.

This was an issue of *devisavit vel non*, directed by the Register's Court of Allegheny County, and tried in the Court below, to determine the validity of a paper purporting to be the last will and testament of one William Johnston, who died on the 4th of December, 1860. By this paper, which bore date the 23d day of December, 1857, the alleged testator, after providing for the payment of debts and legacies in the usual way, and for the erection of a monument to his memory, bequeathed to his only child and daughter, Elizabeth, then Elizabeth Dean, (plaintiff in error,) the sum of \$20. He then gave and bequeathed the residue of his

estate to Sarah Bell Bolton, Eliza Bolton, Olivia Bolton, Josephine Bolton, and Annie Bolton, daughters of John and Rosana Bolton, in the manner therein set forth, in token of his friendship for them. And he appointed the defendants in error, Daniel Negley and Sterley Cuthbert, to be his executors.

The paper, on its face, was duly executed as a will. To its admission as such, a *caveat* was filed by the plaintiffs in error on the following grounds:

That the testator was of non-sane mind and memory at the time of the execution of the alleged will; that it was procured by fraud, coercion, or undue influence; that, at the time of executing it he labored under a monomania, weakness, and delusion in respect to his heir-at-law, which had an undue influence on his judgment; and that he was so importuned by parties having an interest in depriving his relatives of his estate, as to amount to coercion.

On the trial of the issue, the executors, in support of the will, produced the subscribing witnesses, who testified to its due execution, and very distinctly to the sanity of the testator at the time.

On behalf of the contestants, after the proof of the marriage of the testator to Mrs. Jerusha Butler, a widow, the mother of Mrs. Elizabeth Dean, the testator, only legitimate child and heir, Dr. A. H. Gross, the attending physician, was called as a witness, and testified that the testator had for ten years been affected by cancer of the eye and nose, of which disease he at last died. The disease had been, as usual, treated with opiates. He could not rest without them. The habitual use of opium is always detrimental to the mind. The use of opium was commenced in the latter part of 1857—at first in moderate doses, and afterwards constantly.

The testator boarded for some time with Mrs. Bolton. She nursed him, and undoubtedly had a great influence over him when nursing him. “She was,” said the witness, “a vigorous, *managing* kind of woman, such as could manage a man pretty well. A person under the influence of opiates and a painful disease is more liable to be subject to the influence of his nurse.

"I knew Johnston well; I don't think man or woman could control him past his pleasure when he was not under the influence of opium or suffering. When not under pain or opiates, he had a decided will of his own; when under opiates or pain, he was more liable to influences. In 1857 and 1858, his use of opiates was very moderate. When not under the paroxysm of pain or use of opiates, in 1858 or 1859, he was of as sound mind as any man. I never knew of any defect of mind till lately, in 1860.

"Mrs. Bolton was a good nurse; Johnston was very well nursed."

The contestant then offered to prove that the testator had been living in an adulterous connection with Mrs. Bolton, the mother of the residuary devisees, for many years; that the connection, which began about sixteen years after his marriage, was so notorious and conducted in such a manner as to compel Mrs. Johnson, with her daughter, (then about fourteen years old,) to leave his house; and that after the separation, his illicit intercourse with Mrs. Bolton continued uninterruptedly till his death.

That the opiates which the testator had been obliged to take on account of his disease, had weakened his mind, and made him more or less subject to the control of those about him, and particularly to that of Mrs. Bolton, in his business transactions and otherwise.

That "Mrs. Bolton was a woman of masculine vigor and understanding, and exercised a despotic influence over Johnston in relation to many of his business transactions, interfering with his contracts where they did not suit her views, and inducing him to annul or alter them according to her pleasure and dictation, and this both before and after the making of the will. That Mrs. Dean, both before and after the making of the will, visited her father, with the expectation of having confidential and private conversation with him, and upon every such occasion Mrs. Bolton, or some member of her family, remained in her room, so that no such intercourse could take place.

"That Mrs. Dean was always anxious and ready to go and nurse her father during his illness, and to reside with him or have him

reside with her, on condition that he would sever his connection with Mrs. Bolton; of which he was fully aware, and had expressed himself in terms of affection for her, but still refused to sever his connection with Mrs. Bolton."

And that the only source and basis of the testator's fortune was the income derived from his wife's estate, which he had saved and invested.

The offer of this evidence was made in connection with the disposition of the will, for the purpose of showing undue influence by Mrs. Bolton in procuring the execution of the will.

To this offer the proponents of the will objected (except so far as it was proposed merely to show the extent of the testator's property, and the condition of his mind from disease and the application of opiates) for the following reasons, viz.: because,

1. The evidence offered did not tend to throw any light on the testamentary capacity of the testator at the time of making his will.

2. That the fact of alleged adultery did not tend to show undue influence by Mrs. Bolton over the testator at the time of making his will.

3. The acts, declaration, or conduct of Mrs. Bolton, she not being interested in law in establishing the will, were not evidence.

4. The offer did not show, or tend to show, undue influence by any one in setting up the will.

The learned judge overruled the offer for the foregoing reasons, and also because the contestants' counsel did not propose to follow it up by testimony tending to show that fraud, deceit, coercion, or other undue influences were actually used by Mrs. Bolton, or that the will was made under such influences.

The contestants, then, in connection with their previous offer, proposed to prove that Mrs. Bolton did, within a few days prior to the date of the will, use undue influence on the mind of the testator, so as to induce him to annul a lease that he had made, and to assert as a reason for so doing, that he was out of his mind at the time of entering into the same.

This additional offer was also overruled by the learned judge,

because it was not proposed to show thereby that her influence was exerted in any way to procure him to make the alleged will, and that it could not be inferred that the will was made under undue influence, from the fact that Mrs. Bolton had great influence with the testator, and used it for other purposes.

The jury having found for the will, these rulings were assigned for error here.

*Charles Shaler and Bruce & Negley*, for plaintiff in error.

*Marshall & Brown*, for defendants in error.

The opinion of the Court was delivered by

LOWRIE, C. J.—The will of a man who has testamentary capacity cannot be avoided merely because it is unaccountably contrary to the common sense of the country. His will, if not contrary to law, stands for the law of descent of *his* property, whether his reasons for it be good or bad, if they be indeed his own, uninduced by unlawful influence from others. Lawful influence, such as that arising from legitimate or social relations, must be allowed to produce its natural results, even in influencing last wills. However great the influence thus generated may be, it has no taint of unlawfulness in it; and there can be no presumption of its actual unlawful exercise merely from the fact that it is known to have existed, and that it has manifestly operated on the testator's mind as a reason for his testamentary dispositions. Such influences are naturally very unequal, and naturally productive of inequalities in testamentary dispositions; and as they are also lawful in general, and the law cannot criticise and measure them so as to attribute to them their proper effects, no will can be condemned because the existence of such an influence can be proved, and because the will contains in itself proof of its effect. It is only when such influence is unduly exerted over the very act of devising, so as to prevent the will from being truly the act of the testator's, that the law condemns it as a vicious element of the testamentary act; so the law always speaks of the natural influence arising out of legitimate relations. But we should do violence to the morality of the law, and therefore to law itself, if we should apply this rule to unlawful, as well as to lawful

relations; for we should thereby make them both equal in this regard at least, which is contrary to their very nature. If the law always suspects, and inexorably condemns undue influence, and presumes it from the nature of the transaction, in the legitimate relations of attorney, guardian, and trustee, where such persons seem to go beyond their legitimate functions, and work for their own advantage, how much more ought it to deal sternly with unlawful relations, where they are, in their nature, relations of influence over the kind of act that is under investigation. In their legitimate operations those positions of influence are respected; but where apparently used to obtain selfish advantages, they are regarded with deep suspicion; and it would be strange if unlawful relations should be more favorably regarded.

And the voice of the law on this general subject is distinct and emphatic, transmitted through many generations, and embodied in many Latin maxims, of which the following are some: *Nemo commodum capit de injuria sua. Nemo ex proprio dolo consequitur actionem. Frustra legis auxilium petit, qui in legem committit. Pacta, quæ contra bonos mores sunt, nullam vim habent. Ex dolo malo, ex malificio, ex turpi causa, ex pacto illicito, non oritur actio. Ex injuria non oritur jus. Pacta, quæ turpem causam habent, non sunt observanda. In odium spoliatoris, omnia præsumuntur.* All of which may be summed up in one sentence—No one shall derive any profit through the law by the influence of an unlawful act or relation.

The ordinary influence of a lawful relation must be lawful, even where it affects testamentary dispositions, for this is its natural tendency. The natural and ordinary influence of an unlawful relation must be unlawful, in so far as it affects testamentary dispositions favorably to the unlawful relation and unfavorably to the lawful heirs. Ordinary influence may be inferred in both cases, where the nature of the will seems to imply it; but in the former case it is right because the relation is lawful, and in the latter it may be condemned, together with all its effect, because the relation is unlawful.

It is not inconsistent with this, that it has been decided that the

devise of a wife to her second husband was not affected by the fact that *she* knew she had a husband living at the time of her second marriage, even though the second husband heard of it before her death; for this shows no conscious transgression of law by him in marrying her, and her heirs could not set up her fraud on him as a reason for avoiding her will: 8 Harris, 329.

There can be no doubt that a long-continued relation of adulterous intercourse is a relation of great mutual influence of each over the mind and person and property of the other. History abounds with proofs of it, and it requires no very long life or very close observation of persons around us in order to reveal the fact. Our divorce law of 1815 shows its abhorrence of the crime and its influence, by forbidding any one, divorced for adultery, from marrying his or her *particeps criminis* while the injured consort is living, and by disabling a woman thus divorced from devising or conveying her property, if she cohabit with her paramour. And the Canon Law, though it allowed children born before marriage, to be legitimized by a subsequent marriage, refused this privilege to children born of adulterous intercourse, and did not allow even a devise in their favor from the faulty parent.

If, then, there was such a relation between the testator and Mrs. Bolton, at the time of the making of this will, as was offered to be proved, we think that that fact, taken in connection with the devise to Mrs. Bolton's daughters, is evidence of an undue influence exerted by her over the testator and affecting the dispositions of his will, and that it may justify a verdict against the validity of the will. I have, myself, thought that it raised a *presumption of law* of undue influence, but we do not so decide, but leave it as a question of fact merely. We are, therefore, of the opinion that the evidence offered ought to have been received.

Judgment reversed and a new trial awarded.